

## **Part 5 Conclusion.**

### **Chapter 5.1 Physical usability, Legal usability and Use**

The aim of this thesis is to investigate which sections of non-tidal rivers in England were used for the transport of goods and people in the period 1189-1600, both bulk transport to major cities and ports and also local transport to villages, monasteries and markets. It is shown in Appendix O that for journeys by land between towns and cities, in general, ways and not roads existed and that these had a surface which was no better, but often worse, than that found on pasture or unimproved land. It is considered that, apart from grain and fuel carried into London on the Thames, there is insufficient evidence to quantify the amount of goods carried.

Before proceeding further it is worth considering an analogy. There is day and there is night, light and dark. Yet in the evening one can not establish the exact time that one moves from one to the other. There are different definitions of darkness, unable to read outdoors, unable to see a hand in front of one's face, and many other definitions in between. Darkness comes at different times as the seasons vary and according to the amount of cloud. Finally on some moonlight nights, under some definitions, it is never dark.

So it is with the physical usability of rivers. Some sections of rivers are usable and others are not. But the dividing line varies from season to season, according to the weather, the amount of recent scouring and sometimes the limit is the source of the river. Those who have written about limits of navigability may not have realised this. No text has been found which clearly states that the limits of navigability moved.

The earlier writers about the use of rivers referred to 'heads of navigation' as if the upper limit of use was fixed. However in a book published in 2007 this approach was rejected. Blair, the editor, wrote at the end of his 'Introduction' - 'For the study of traffic and transport in and around England before 1250, this book is a starting point rather than a summing-up: if it encourages others to explore further by showing how

much we still do not know, it will have served its purpose.’<sup>1</sup> In the book Bond described how one may identify ‘Human Modifications of River Channels’<sup>2</sup> and Gardiner wrote about the Hythes, Small Ports, and Other Landing Places in Later Medieval England. He stated that ‘These places were of limited economic significance; locally they may have been of considerable value; collectively, they played an important role in the movement of goods and people in later medieval England.’<sup>3</sup>

The purpose here is to establish the geographic extent of these landing places, if that is not too grand a term to use to refer to the river bank beside a field or cottage, the length of sedges on a mere, the side of a flooded valley from which mother and child embarked to be taken to a baptism service. Next to the mill there may well have been a wharf, but at the other end of the journey there was no wharf for as Pepys observed they were just ‘rowing ... and then wading.’<sup>4</sup>

One change has occurred in the relationship between physical usability, legal usability and use. From 1189 to 1600 legal usability existed where there was physical usability. Since 1830, in legal texts, it has been assumed that historic legal usability existed only where there had been prior historic use.

It has been demonstrated that because of fluctuating precipitation, changes in channel form and autogenic channel changes usability has fluctuated. It has also been shown that anthropogenic channel modification, clearance, drainage, reduction in the water-table levels and abstraction have reduced usability on many or most rivers. Usability has been improved on rivers which have been canalized. It seems likely that the presence of a series of weirs in a river improves the usability upstream but reduces it downstream of each weir unless the river has been effectively canalised.<sup>5</sup>

Cole’s work has interesting implications not only for the use of rivers but also for their usability. If these thirty communities took their names from the fact that they were responsible for maintaining the usability of a river then there are likely to have been

---

<sup>1</sup> John Blair, ‘Introduction’. In Blair 2007.

<sup>2</sup> Ed Rhodes, ‘Identifying Human Modification of Rive Channels.’ In Blair 2007.

<sup>3</sup> Mark Gardiner, ‘Hythes, Small Ports, and Other Landing Places in Later Medieval England.’ In John Blair 2007, 85.

<sup>4</sup> Samuel Pepys, *Diary*, London: Macmillan, 1905. 18 September 1663.

<sup>5</sup> See definition in Chapter 1.2.

many other sections of rivers whose usability was maintained by regular work. This seems to imply that river transport was important for a large number of communities sited at locations where the rivers are now unusable as with the four Eaton's in Yorkshire.

The relevant facts about river use may be summarized:

1. It was shown in Part 2 that the usability of rivers has always varied due to natural and anthropogenic factors, that rivers are now in general less usable by boats than they were in the period 1189-1600 and that at present it is not possible to identify all the sections which have become unusable.
2. It was shown in Part 3 that in the period 1189-1600 there was a legal right to use all rivers which were physically usable.
3. There were anthropogenic obstructions on some rivers, especially in the period 1300-1535, and access to the rivers from the sea has varied.
4. In general in the late medieval period places with access to water transport were more prosperous than those without.
5. At least 34 canals were dug to improve transport between c.1000 and 1250. Each of these was linked to a river which was used for transport.
6. For the long distance transport of bulk goods water transport, where available, was cheaper. For short distances this was not necessarily the case and other factors like convenience, security and speed might override lower costs.
7. It is shown in Appendix O that the surface used by long distance land transport was seldom better than unimproved pasture and in some places worse.
8. Over the past 200 years knowledge of the historic use of rivers has increased and it is known that there is still more to be discovered. However there never was a written record of most journeys. Possibly on the best recorded rivers one journey in a thousand was recorded, on other rivers less than one journey in a million was recorded.
9. Some rivers were probably used from their source like the Little Ouse and Waveney.
10. There are in excess of 2724 miles of river which were recently listed as being usable.
11. There is Category A evidence of the historic use of 2158 miles of rivers.

12. There is Category B evidence of the historic use of 3022 miles of rivers.
13. Of the 187 rivers for which there is evidence of use it is known that at least 14 rivers were used further upstream for an unknown distance.

Thus it is claimed that with the present state of knowledge the use of rivers in the period 1189-1600 is best described by the statements ‘(1) there is a high probability that each section of river which is now physically usable was usable by small boats, both physically and legally, in the period 1189-1600 and that (2) on the balance of probabilities each section of river which is now physically usable was used during that period.’

The second statement seems to be a new concept for England but not for Scotland. In 1976 Lord Fraser said:

It seems most unlikely that any river in Scotland which is capable of providing a useful channel of communication for transport would not have been used by now, especially in the days before 1781 when there was no competition from railways and motor lorries.<sup>6</sup>

---

<sup>6</sup> per Lord Fraser: *Wills’ Trustees v Cairngorm Canoeing and Sailing School Limited*. 1976 SLT 213.

## Chapter 5.2 Present Day Legal Implications

There is a statutory right to use some of the rivers in England. These include the Thames downstream of Cricklade, the Medway downstream of Tonbridge and the Cam downstream of Cambridge.<sup>7</sup> The list is not well-defined as for some rivers, like the Western Rother and Sussex Ouse, the Navigation Acts have lapsed but have not been repealed. This statutory right is additional to any common law right. This chapter is not concerned with the statutory right but only with the common law right.

In 1973 the Select Committee of the House of Lords on Sport and Leisure stated that, 'The legal question of rights of way over water must be settled. A number of different legal interpretations of this right of way have been referred to in evidence and it is time for these to be resolved.'<sup>8</sup> Actions taken by various official bodies since then to resolve the question are listed in Appendix N.

The books on the Law of Waters state that a public right of navigation exists only where there is evidence of historic use. The amount of use required to be proved has to be sufficient to show that the riparian owner intended to dedicate the public right.<sup>9</sup> No case has been found of Common Law dedication of a public right of navigation.<sup>10</sup>

In Part 2 of this thesis it was shown that rivers which are usable now were probably usable in the period 1189-1600. In Part 3 it was concluded that throughout the period 1189 to 1600 there was a public right to use all rivers which were physically usable. It is an established principle in English law that a public right can only be removed by statute or because the right has become unusable. Public rights include freedom of religion and speech and freedom from arrest. One example of these rights is that where there was once a public right of navigation there is still a public right of navigation

---

<sup>7</sup> The Canoe England 2010 Members' Directory also includes:- Great Ouse from Kempston, Beds; Little Ouse; Wissey; Lark; Ancholme; Nene from Northampton; Welland; Glen; Suffolk Stour from Brundon, Suffolk; Warwickshire Avon from Alveston to Twekesbury; Norfolk Broads.

<sup>8</sup> Second Report from the Select Committee of the House of Lords on Sport and Leisure. 1973. HL 193, lxxiii.

<sup>9</sup> H.J.W. Coulson and Urquart A. Forbes, *The law relating to Waters, Sea, Tidal and Inland*. 2<sup>nd</sup> Edition. London: Sweet and Maxwell, Limited. 1902.

A.S. Wisdom, *The Law of Rivers and Watercourses*. London: Shaw & Sons Ltd. 1962.

William Howarth, *Wisdom's Law of Watercourses*. 5<sup>th</sup> Edition. Crayford: Shaw & Sons Limited. 1992.

<sup>10</sup> Dedication has been made under the Countryside and Rights of Way Act 2000.

unless the right has been extinguished by statute or the river is no longer usable.<sup>11</sup> If the conclusion to Parts 2 and 3 of this thesis are accepted then there is a public right of access to all rivers which are physically usable.

The implication of this is that the length of the rivers on which there is a public right of navigation in England, and in Wales where the laws are the same, increases from the present generally accepted length of 2,179 km (1,361 miles) to over 14,862 km (9,289 miles). [Based on the data in *Water-Based Sport and Recreation: the facts*.<sup>12</sup>]

Until this is generally accepted, or confirmatory legislation is enacted, the data included in Appendix A will provide evidence for the existence of a public right of access on many more rivers than was previously available.

Atiyah wrote:

Laws may be bad because they are ‘technically’ bad; for instance, because they are obscure, ambiguous, internally inconsistent, difficult to discover, or hard to apply to a variety of circumstances. And secondly, laws may be substantively ‘bad’ simply in the sense that they produce unacceptable results – injustice or plain idiocy, or less extremely, because they are inefficient and expensive, or produce inconsistency or anomaly between like cases.<sup>13</sup>

The present general understanding of the law seems to be bad in both senses.

---

<sup>11</sup> Confirmed by Mr Justice Lightman, *Rowland (Josie) v The Environment Agency* [2003] 1 All ER 625.

<sup>12</sup> Brighton University Consortium, *Water-Based Sport and Recreation: the facts*. 2001, 30.

Paper prepared for Department for Environment, Food and Rural Affairs (Countryside Division); British Waterways; Countryside Agency; Countryside Council for Wales; Sport England.

<sup>13</sup> P.S. Atiyah, *Law & Modern Society, 2<sup>nd</sup> Edition* Oxford: Oxford University Press. 1995, 203

### **Chapter 5.3 Further Research.**

The study of the historic form and discharge of rivers is most likely to be funded by those interested in water resources and flooding. Much could be done to apply the methods used to study the Tyne to other rivers because forecasting the future depends on knowledge about the past. This research may also assist in the understanding as to which rivers were historically usable.

It has been shown that the present records of historic use are only a small percentage of the total number of journeys. The limit of historic use and the limit of recorded historic use may on many rivers be far apart. The lists of records of historic use will in time become greater as those interested in the subject find or recognise more records. But there comes a time when such academic research deteriorates into an activity similar to stamp collecting. It is suggested that the accumulation of lists like Appendix A, while needed early in the research of a topic, becomes less useful as the lists increase and as it becomes clear that any such list will never be complete. On the other hand the rapid increase in the availability of historic records in searchable form will make it much easier in the future to find further examples of the historic use of rivers.

It seems likely the ending of disputes on the banks of rivers between boaters and riparian owners will only come with the introduction of legislation clarifying their respective rights. This may be introduced, as it was in Scotland,<sup>14</sup> by a general statement that all rivers which are physically usable may be used by the public. Any attempt to state the physical size of the sections to be declared usable would require considerable research to obtain a workable definition.

One appropriate subject for research in the near future is the transport of specific types of goods like stone and pottery. Appendix C is, it is hoped, a useful preliminary study of the transport of stone for cathedrals. However a fuller study, including, where possible, estimates of the quantity of stone moved, would seem to be an interesting project. This could include investigation of the way in which the availability of suitable stone affected the choice of the sites of cathedrals and minsters. Symonds' study of the

---

<sup>14</sup> Land Reform (Scotland) Act 2003, 2003 asp 2.

pottery of Lincolnshire<sup>15</sup> could be repeated in other counties and may produce further convincing evidence of river transport.

Confirmation of Coles' interpretation of the meaning of the word *ēa-tūn* would provide independent evidence for the conclusions reached in this thesis.

---

<sup>15</sup> Leigh Andrea Symonds, 'Landscape and Social Practice.' *BAR*. British Series 345. 2003, 23 and 128.